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Pan-Oston Company and Sheet Metal Workers' International Association Local No. 433, AFL-CIO. Case 26-CA-18679

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND TRUESDALE

On March 29, 1999, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief, cross exceptions, and a brief in support of cross exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, except as discussed below, and to adopt the recommended Order as modified and set forth in full below.²

I. THE SUPERVISORY STATUS OF TODD HOLMES

The judge found that the Respondent, through Supervisor Todd Holmes, violated Section 8(a)(1) by engaging in surveillance, creating the impression of surveillance, and interrogating an employee. The Respondent has excepted to these findings on the basis that Holmes was not a statutory supervisor within the meaning of Section 2(11) of the Act at the time the events relevant to this proceeding occurred. We find merit in this exception.

In finding that Holmes was a supervisor during the relevant period, the judge relied upon the following: (1) Holmes' testimony referring to himself as a supervisor; (2) employee Douglas Springer's testimony that Holmes was a supervisor; and (3) evidence that employees at a union meeting told the business agent that Holmes was a supervisor. We find this evidence to be insufficient to support the judge's finding. An employee's title alone cannot establish whether that employee is a supervisor.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric*, 335 NLRB No. 15 (2001).

See *Waterbed World*, 286 NLRB 425, 426 (1987), enfd. 974 F.2d 1329 (1st Cir. 1992). Rather, the party who asserts that an individual is a supervisor within the meaning of Section 2(11) of the Act must prove that the individual possesses at least one of the categories of authority enumerated in that section, and that his or her exercise of such authority requires the use of independent judgment.³ *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426 (1998).

The judge further relied on evidence that Holmes signed an employee discipline form on the line designated for the supervisor. However, the record indicates that the decision to discipline the employee was made by Tom Staples, an admitted supervisor whose signature also appears on the form, and that Holmes signed the form merely as a witness.⁴ Because Holmes did not participate in the decision to administer the discipline, we find the judge's reliance on this evidence to be misplaced.

We conclude that the General Counsel, who has the burden in this case, has proffered no evidence that Holmes possessed any of the indicia of a supervisor at the time the relevant events took place. Although the Respondent does not dispute that Holmes was a statutory supervisor at the time of the hearing in December 1998, we find no evidence to establish that Holmes was a supervisor at the time he engaged in the alleged unlawful conduct in early 1998. We therefore reverse the judge and find that Holmes was not shown to be a statutory supervisor when he engaged in conduct alleged to be a violation of Section 8(a)(1).

II. THE AGENCY STATUS OF TODD HOLMES

Alternately, the judge found that if Holmes was not a supervisor then "at the very least he had apparent supervisory authority." We interpret this to be a finding that Holmes' conduct is attributable to the Respondent because he acted with apparent authority when he engaged in the alleged misconduct. Having reviewed the record, we conclude that there is insufficient evidence to support the judge's finding, and accordingly, we reverse.

The Board applies the common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when

³ Sec. 2(11) of the Act defines a supervisor as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

⁴ Holmes' testimony that he signed the form as a witness is undisputed.

that employee makes a particular statement or takes a particular action. *Cooper Industries*, 328 NLRB 145 (1999); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB at 428. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp.*, 315 NLRB 725 (1994) (and cases cited therein). Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance)* 291 NLRB 82 (1988) (citing Restatement 2d, Agency, §27 (1958, Comment a)).

The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB at 426-427 (and cases cited therein). The Board considers the position and duties of the employee in addition to the context in which the behavior occurred. *Jules V. Lane* 262 NLRB 118, 119 (1982).

The Board may find agency where the type of conduct that is alleged to be unlawful is related to the duties of the employee. For example, in *Hausner Hard-Chrome of KY, Inc.*, supra, the Board found that the heads of various departments who regularly communicated management's production priorities to employees acted as agents of the employer when they told employees that the employer would likely shut down the plant if employees voted in favor of a union.

In contrast, the Board may decline to find agency where an employee acts outside the scope of his or her usual duties. Thus, in *Waterbed World*, supra, the Board found that an employee who interrogated other employees and threatened them with discharge did not act as an agent of the employer because the employer had never held out the employee as being privy to management decisions or as speaking on its behalf.

Although not dispositive, the Board will consider whether the statements or actions of an alleged employee agent were consistent with statements or actions of the employer. The Board has found that such consistencies support a finding of apparent authority. For example, in *Hausner Hard-Chrome*, discussed above, the Board found that the "manifestation of apparent authority was strengthened" because the statements made by the department heads were consistent with statements made by management. 326 NLRB at 428. See also *Great American Products*, 312 NLRB 962 (1993).

We emphasize that an employee may be an agent of the employer for one purpose but not another. For example, in *Cooper Industries*, supra, the Board found that employees could reasonably believe that employee facilitators who made various coercive statements acted as agents of the employer because the employer had held them out as primary conduits for communication with management. However, the Board found that employees would not reasonably believe that a facilitator who attended a union meeting acted as an agent of the employer for purposes of surveillance where the union representative had questioned the facilitator, accepted his explanation that he was there as a regular worker, and permitted him to remain. 328 NLRB 145, 146.

Finally, it is the burden of the party who asserts that an individual has acted with apparent authority to establish the agency relationship. *Millard Processing Services*, 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1994). As discussed above, the party who has the burden to prove agency must establish an agency relationship with regard to the specific conduct that is alleged to be unlawful.

In applying these principles here, we find that the General Counsel, who bears the burden of proof, has failed to establish that the Respondent has taken any action from which employees could reasonably conclude that Todd Holmes was acting on the Respondent's behalf when he engaged in the specific conduct alleged to be unlawful. The record indicates that Holmes was a group leader and that he attended supervisory meetings during the relevant period. However, it contains no relevant evidence regarding Holmes' duties in his position during this time, nor does it indicate what occurred during these supervisory meetings.⁵ Thus, there is no evidence from which we can determine whether any of the actions alleged to be unlawful were within the scope of or related to Holmes' duties as a group leader.

Additionally, there is no evidence that the Respondent communicated to employees that Holmes was acting on its behalf at the time he engaged in the acts in question. The Respondent did nothing that would indicate to employees that it sent Holmes to a union meeting, or that Holmes spoke for management when he questioned an employee about the meeting or told employees they were being watched. In the absence of such evidence, we cannot conclude that, based solely upon his position as group leader, employees could reasonably believe that Holmes was speaking or acting on behalf of the Respondent.

⁵ While counsel for the General Counsel specifically questioned Holmes about his duties once he became a supervisor, counsel failed to elicit any specific information concerning Holmes's duties or responsibilities as a group leader during the relevant period.

Holmes' questioning of an employee about a union meeting in late March was consistent with the actions of Supervisor Mike Ward, whose similar questioning of an employee we find to be unlawful (see below). However, we find that this evidence by itself is insufficient to establish apparent authority.

Accordingly, because we find that Holmes was not an agent of the Respondent, we find that his conduct did not violate Section 8(a)(1).⁶

III. THE INTERROGATION OF DOUGLAS SPRINGER BY SUPERVISOR MIKE WARD

We affirm the judge's finding that admitted Supervisor Mike Ward violated Section 8(a)(1) when he questioned employee Douglas Springer about a union meeting. In finding the violation we do not rely on the judge's rationale, but rather find the questioning coercive for reasons set forth below.

The test for determining whether an employer has unlawfully interrogated an employee is whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984). Here, Ward's questioning of Springer took place in the Respondent's plant while Springer was working the third shift in April or May 1998, when employees were attempting to organize. Although Springer had been active in union organizing, there is no evidence that he openly supported the union or that he had ever made his union sympathies known to Ward or any other supervisor. Springer had been present at an employee meeting in December 1997 during which Plant Manager Dan Day declared that he would not tolerate a union and would do what he could to keep the union out. Thus, at the time of the questioning Springer was aware of the Respondent's hostility toward the Union.⁷

Contrary to our dissenting colleague, we find the totality of the evidence here sufficient to establish that Ward's questioning of Springer was coercive and therefore violative of Section 8(a)(1). Although the record is silent as to the precise words used by Ward, Springer testified that Ward asked him about a union meeting on Sunday afternoon. Obviously, the question was about protected union activity. We conclude that such an inquiry, made under the circumstances discussed above, where the employee had not previously disclosed his union sympathies and

was aware of the Respondent's hostility towards the Union, is coercive. Thus, we affirm the violation.

IV. GARY FERGUSON'S FINAL WARNING AND DISCHARGE

The judge found that the Respondent violated Section 8(a)(3) and (1) by issuing a final written warning on April 3, 1998, to employee Gary Ferguson—who led the effort to bring a union into the Respondent's plant—and by terminating him approximately 1 month later. We agree.

Under *Wright Line*,⁸ the General Counsel bears the burden of establishing that Ferguson's protected union activity was a motivating factor for the Respondent's conduct. We agree with the judge that the General Counsel has met his burden.⁹ However, for reasons discussed above, we do not rely on the actions of Todd Holmes in finding animus on the part of the Respondent. Rather, we find animus based upon Ward's unlawful questioning of Springer, Plant Manager Day's statement to employees that he would not tolerate a union, and Supervisor Douglas England's selective enforcement of a no-talking rule against prounion employees.

Once the General Counsel established the antiunion motivation for the Respondent's actions, the burden shifted to the Respondent to show that it would have disciplined and discharged Ferguson in the absence of his union activity. The Respondent contends that Ferguson was discharged because his job performance was unsatisfactory as measured by a work sampling system that the Respondent began utilizing in February 1998.¹⁰ The judge found this reason was pretextual and that the Respondent's actions were therefore unlawful. We affirm the judge's findings.

V. THE RESPONDENT'S EARLIER WARNINGS TO FERGUSON

The General Counsel has excepted to the judge's inadvertent failure to rule on allegations that Respondent violated section 8(a)(3) and (1) by issuing warnings to Ferguson on January 15, and on March 27, 1998. We find merit in these exceptions, and further find that the Respondent violated the Act as alleged.

Supervisor Douglas England issued a written warning to Ferguson on January 15 because of Ferguson's low productivity on the prior day. Ferguson testified that he tried to explain to England that some of the parts on

⁸ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

⁶ The Respondent argues that Holmes' statement to Philip Mosby was not coercive and therefore did not constitute unlawful interrogation. Because we find that Holmes was neither a supervisor nor an agent of Respondent at the time he made the statement, we need not reach this issue.

⁷ Ward did not testify and therefore Springer's testimony regarding this issue is undisputed.

⁹ In addition to the judge's findings regarding the Respondent's knowledge of Ferguson's union activity, we rely on the evidence that both Plant Manager Day and Supervisor Tom Staples, who initiated the investigation of the brake press operation that eventually led to Ferguson's discharge, had personal knowledge that Ferguson was involved in union organizing.

¹⁰ The work sampling system is more fully described in Sec. II.D. of the judge's decision.

which he had worked that day were rework or rerun work that required him to change the setup of his machine in between running the parts through. England told Ferguson that he did not want to hear any excuses, and told him to sign the discipline form. The evidence indicates that at the time of this incident the Respondent was aware that Ferguson supported the Union.

England had previously reprimanded Ferguson in December 1997 for talking with another employee. Ferguson was near his machine talking to the operator next to him when England walked over and told them to get back to work. As England walked over to Ferguson, he passed by several other employees who were also talking but said nothing to them. When Ferguson pointed out that he was not the only one talking, England replied that the fact that the others were talking did not mean that he had the right to talk. England then walked away from Ferguson and walked past the other employees, who continued to talk, and again said nothing. The employees who England allowed to talk were opposed to the Union. The Respondent has no rule against employees talking to one another.

We conclude that the December incident, which occurred only about a month before England issued the January 15 warning, is evidence of England's hostility towards Ferguson because of Ferguson's pronoun position. England did not testify and Ferguson's testimony concerning these events is undisputed. Under these circumstances we find that England issued the January 15 warning to Ferguson in retaliation for his union activity in violation of Section 8(a)(3) and (1).

Ferguson also received an oral warning on March 27 for low productivity. This warning was based upon Ferguson's performance as measured by the Respondent using its work sampling system. Because we have determined that the Respondent's purported reliance on this system was pretextual, we find that the warning of March 27, also based upon work sampling, was given in violation of Section 8(a)(3) and (1).

VI. PHILIP MOSBY'S FINAL WARNING

The judge found that the Respondent violated Section 8(a)(3) and (1) by issuing a final written warning to Philip Mosby on April 3, 1998. In its exceptions, the Respondent argues, inter alia, that the General Counsel failed to establish that it had any direct knowledge of Mosby's union activities. We agree with the Respondent that the evidence is insufficient to establish such knowledge. Mosby was a union supporter who signed an authorization card and tried to recruit other employees. However, there is no direct evidence to indicate that the Respondent was aware of Mosby's union activity.

Nevertheless, we affirm the judge's finding of a violation. It is well established that, in the absence of direct

evidence, an employer's knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn. Such circumstances may include the employer's demonstrated knowledge of general union activities, the employer's demonstrated union animus, the timing of the discipline or discharge, and pretextual reasons for the discipline or discharge asserted by the employer. *Kajima Engineering & Construction*, 331 NLRB No. 175 (2000) (and cases cited therein). See also *Darbar Indian Restaurant*, 288 NLRB 545 (1988); *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046 (1985).

Applying these criteria here, we find that the evidence supports an inference that the Respondent was aware of Mosby's involvement with the Union. It is undisputed that the Respondent was aware that the Union was attempting to organize its employees. As discussed above, the evidence also reveals that the Respondent harbored antiunion animus as demonstrated by its violations of Section 8(a)(3) and Section 8(a)(1). Additionally, Mosby's final warning was given on the same day as the unlawful warning to Ferguson, a known union supporter, and the language was almost identical to that of Ferguson's warning.

As with the final warning to Ferguson, we also find that the reason proffered by the Respondent for Mosby's final warning does not withstand scrutiny. Mosby worked in the brake press area of the plant with Ferguson and was evaluated under the same work sampling system, which the judge found to be selectively directed at the brake press operators. The Respondent asserts, as it did with regard to Ferguson, that the reason for the warning was its determination that Mosby's performance was unsatisfactory based upon data from the work sampling system. However, when Mosby asked Supervisor Tom Staples for specific information regarding his alleged nonproductivity, the only response he received from Staples was that he was not productive. In fact, on the day that Mosby was allegedly not productive, the Respondent's records indicate he was working 95 percent of the time. In these circumstances, and in light of our findings that the same defense proffered by the Respondent against Ferguson was pretextual, we find that the Respondent's asserted reason for Mosby's discipline also to be pretextual.

Accordingly, based on all the foregoing, we find a sufficient basis to infer knowledge and we affirm the judge's finding that the Respondent's final warning to Mosby violated section 8(a)(3) and (1).

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for paragraph 3.

"3. The Respondent violated Section 8(a)(1) of the Act by coercively interrogating employee Douglas Springer about his union activities."

2. Substitute the following for paragraph 4.

"4. The Respondent violated Section 8(a)(3) and Section 8(a)(1) of the Act by issuing employee Gary Ferguson a written warning on January 15, 1998, a verbal warning on March 27, 1998, a final written warning on April 3, 1998, and by discharging him on May 8, 1998, because of his protected activity; and by issuing employee Philip Mosby a final written warning on April 3, 1998, because of his protected activity."

ORDER

The National Labor Relations Board orders that the Respondent, Pan-Oston Company, Glasgow, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees about their union and other protected activities.

(b) Discouraging membership in Sheet Metal Workers' International Association, Local No. 433, AFL-CIO, or any other labor organization, by giving warnings to or by discharging employees because of their Union or other protected activities, or by discriminating against them in any other manner with respect to their wages, hours, tenure of employment or any other terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 8(a)(1) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gary Ferguson reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, dismissing if necessary any employee hired to fill said position, and make him whole in the manner set forth in the remedy section of this Decision.

(b) Within 14 days from the date of this Order, expunge from its records all references to its discharge of Gary Ferguson and to its written warning of January 15, 1998, its verbal warning of March 27, 1998, and to its final written warning of April 3, 1998 given to Ferguson, inform Ferguson in writing that this has been done, and that the aforesaid actions will not be used as the basis of any future discipline.

(c) Within 14 days from the date of this Order, expunge from its records all references to its final written warning of April 3, 1998, given to Philip Mosby and inform Mosby in writing that this has been done, and that the aforesaid actions will not be used as the basis of any future discipline.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Glasgow, Kentucky facility, copies of the attached notice marked "Appendix¹¹" Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 15, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting in part.

I disagree with my colleagues in one respect. I cannot conclude that the Respondent's supervisor, Mike Ward, unlawfully interrogated employee Douglas Springer. Springer testified only that, in April or May of 1998,

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Ward asked him "about a Union meeting."¹ There is no evidence as to the precise question asked by Ward. My colleagues seek to supply only the general testimony, but no specifics. In this regard we do not know precisely what Springer was asked, whether this was a casual or isolated question, or any of the circumstances surrounding the question.

The majority notes that the questioning took place during an organizing campaign. But surely this is not enough to make the question coercive. My colleagues also rely on the fact that, although Springer was active in organizing, there was no evidence of management knowledge of his union activities. Concededly, where the union sentiments of an employee are unknown, it may be coercive to ask an employee where he stands on the issue. However, as noted above, we do not know enough about the question to determine whether it was of this character.

In sum, without more regarding the precise words used, or the locus and context of the question, the evidence is insufficient to establish a violation of Section 8(a)(1).² Finally, my colleagues rely on Springer's presence at an employee meeting months earlier during which the Respondent's plant manager (Day) made a comment which my colleagues find to be evidence of the Respondent's hostility towards the Union. Assuming that the comment evidenced hostility, that would not show that Ward's question, months later, was coercive.

Dated, Washington, D.C. September 28, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

¹ See the judge's decision at Sec. F(1)(b).

² See e.g. *Bourne v. N.L.R.B.*, 332 F.2d 47 (2nd Cir. 1964); and *Sunnyvale Medical Center*, 277 NLRB 1217 (1985).

To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees about their union and other protected activity.

WE WILL NOT discourage membership in the Sheet Metal Workers' International Association, Local No. 433, AFL-CIO, or any other labor organization, by giving warnings to or by discharging employees because of their Union or other protected activity, or by discriminating against them in any other manner.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 8(a)(1) of the Act.

WE WILL offer Gary Ferguson reinstatement to his former position, and make him whole with interest for any less of earnings he may have suffered because of our unlawful discharge of him.

WE WILL expunge from our records all references to our discharge of Gary Ferguson and all our unlawful warnings given to Gary Ferguson, and to the unlawful final written warning given to Phillip Mosby, and inform them in writing that this has been done and these actions will not form the basis of any future discipline of them.

PAN-OSTON COMPANY

Melvin L. Ford, Esq., for the General Counsel.

John T. Lovett, Esq. (Brown, Todd & Heyburn, PLLC), for the Respondent.

David K. Harnes, International Representative for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on May 21, 1998,¹ by Sheet Metal Workers' International Association, Local No. 433, AFL-CIO, (the Union) and an amended charge on August 21. Complaint issued on August 27, and alleges that Pan-Oston Company (Respondent or the Company) engaged in surveillance of its employees' Union activities by a supervisor's attendance at a union meeting, by creating the impression of surveillance of such activities, and by interrogating employees about the location of a union meeting. In addition, the complaint as amended at the hearing alleges that Respondent issued a final written warning to employee Philip Mosby, a final written warning to employee Gary Ferguson, and that it discharged Ferguson on May 8, all of the foregoing actions because of the employees' union sympathies or activities.

A hearing on these matters was held before me in Nashville, Tennessee, on December 10 and 11. Thereafter, the General Counsel and Respondent filed briefs. On the basis of all the

¹ All dates are in 1998 unless otherwise specified.

evidence of record, and my observation of the demeanor of the witnesses, I make the follo wing.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Glasgow, Kentucky, where it is engaged in the manufacture of counters for retail businesses. During the 12-month period ending July 31, Respondent purchased and received at its Glasgow, Kentucky facility goods valued in excess of \$50,000 directly from points outside the Commonwealth of Kentucky. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Gary Ferguson's Employment History and Union Activities

Gary Ferguson was hired in July 1990 as a brake press operator in the machine line department. This department, on each shift, consists of one "shear" operator, two "Pega" (machine) operators, four brake press operators, each on a separate machine, two "Finn-power" operators (for punching), one buffer, and one machine line support employee.

The function of a brake press operator is to bend metal to conform to the design of each counter. Each separate design requires a "tool set-up." On some orders multiple counters are produced from the same "setup." The brake press operator checks his drawings to determine the nature of the bend, ascertains the parts which he has, and determines the dimensions. Brake press operators customarily talk to one another about their work, and sometimes work on the same job.

Some of the brake press operator's functions include "reworks" and "reruns." A "rework" is an unacceptable part that the operator can flatten out and rebend. A "rerun" is a missing piece, or one so damaged that it cannot be corrected, but must be made from the start beginning with the shear operator. "Reworks" increase the number of times the brake press operator has to make a tool "setup", for which he produces only one part. A rework assignment requires a decision by the machine line leader as to the correct way to make the bends, the correct dimensions, and other aspects of the job. While this decision is being made, the brake press operator must wait. The result of these factors is less productivity by the brake press operator.² After a counter is completed in the machine line department, it is sent to the welding, painting, or assembly department.

Ferguson received a reprimand in June 1992, directing him to improve his work quality and quantity.³ After starting as a brake press operator he became a "quality control" employee in 1993. In June 1994 Ferguson was transferred to the third shift with an increase in pay. In November 1994, he was transferred to the second shift as a team leader to assist a new line leader for that shift. After 2 weeks in this job, he was transferred "to days" to work with Terry Leber, the line leader.

² Testimony of Terry Leber, a machine line leader.

³ R. Exh. 1.

However, the Company was "downsizing" team leaders, and in March 1995, Ferguson was transferred to another plant as a brake press operator.⁴ His pay increase was taken away. However, in January 1996 he was again promoted to line leader, and his pay increase was restored.

In 1997 the Company went from a 3-shift 8-hour operation to a 2-shift 12-hour operation, with two crews working alternate days. Work at POKY 3 diminished, and in January 1998 Ferguson was transferred back to the original plant as a brake press operator, again under team leader Terry Leber. According to Leber, he assigned 50 to 70 percent of the new work and rerun jobs to Ferguson.

Ferguson initiated a union campaign in October 1995 by calling the union representative. He obtained card signatures, distributed handbills, and held about three union meetings. In November 1995 Mike Ward, an admitted supervisor, told Ferguson that he understood there was a union meeting that night, and asked Ferguson how they were going.⁵ Ferguson discontinued these efforts because of a lack of response. Ward gave him a written warning on December 12, 1995.⁶

Ferguson called the union representative again in 1997 and recommended another campaign. The union representative asked Ferguson to determine whether there was more interest this time, and Ferguson did so. A first union meeting was held in July 1997, and subsequent meetings approximately once per month. Ferguson again obtained signatures on authorization cards, signed one himself in September 1997 and distributed handbills for about 3 to 4 months in a shopping area in the town of Glasgow, Kentucky, where the plant is located.

In August 1997 Ferguson was a machine line support, and was issued a reprimand for talking to other employees and failing to keep brake press operators supplied with materials.⁷ Ferguson replied that it was necessary to talk to operators to determine their needs. In October 1997, Supervisor Mike Ward approached Ferguson and asked him how his meetings were going. Ferguson replied that his father's meetings were going well. Ward responded that he was talking about the "Union meetings," that the "Union stuff sure keeps management on its toes," and that he would sign a card himself if he were not a supervisor. I credit Ferguson's uncontradicted testimony.

The Company reimbursed employees for jeans purchased for work. In September 1997, a lead person named Terry Jessie was passing out reimbursement forms for this purpose. He did not give one to Ferguson, and the latter asked the reason. Jessie replied Ferguson was trying to get a "damn Union" into the plant, and that if that happened the employees would not get any more reimbursement for jeans. Ferguson filed a complaint and subsequently had a meeting about the incident with admitted Supervisors Douglas England and Paul Smith, together with Terry Jessie. The latter asked Ferguson why he was so strongly behind the Union, and the supervisors looked at Ferguson as if

⁴ The name of the plant was "POKY 3" (Pan-Oston Kentucky Plant Number 3). The Company had previously owned three plants, which explains part of the name of this plant.

⁵ Ward did not testify, and Ferguson's believable testimony is credited.

⁶ R. Exh. 3.

⁷ GC Exh. 9.

they were expecting him to answer. He did not answer the question, but Supervisor Smith told him that the Union had nothing to offer the employees. Smith did not testify, and I credit Ferguson's uncontradicted testimony.

Shortly after this conversation, Ferguson went to Personnel Manager Sharon Jones, an admitted supervisor and asked about the incident. She asked why the employees were interested in getting a Union into the plant. Ferguson replied that they were interested in job security, better wages, insurance, and seniority. Jones wrote down what Ferguson had said.

Former employee Douglas Springer testified that union meetings occurred once or twice a month. Springer stated that, in April or May 1998, supervisor Mike Ward asked him about a union meeting being held on a Sunday afternoon. Another supervisor asked him the same question. Springer's testimony was uncontradicted, and is credited.

B. The Alleged Surveillance and Impression of Surveillance

The complaint alleges that Respondent engaged in surveillance of union activities by attending a union meeting, and, at about the same time, created an impression of surveillance by telling employees that Respondent was watching them.

The individual who engaged in these activities was Todd Holmes. The complaint alleges and the answer denies that Holmes was a supervisor. Former employee Douglas Springer testified that Holmes was a supervisor, although not Springer's immediate supervisor. Holmes testified that he was a supervisor in early 1998, but was hourly paid. Other supervisors are hourly paid, according to Holmes. He was "acting as a supervisor, but was not getting paid as a supervisor." Beginning about three months before his testimony in this proceeding, i.e., in about September or October 1998, Holmes testified he was compensated by salary. However, on April 3, 1998, he signed as a supervisor a final written warning issued to Philip Mosby.⁸

The union meeting was held on January 9, 1998, in a Day's Inn. Springer was present. He was talking with Shane White; Holmes was nearby. Springer testified that he and White felt that they were being watched. The employees told the business agent that Holmes was a supervisor, according to Philip Mosby.

Holmes testified that he was an hourly employee, and had a right to attend. Holmes denied that anybody in management asked him to attend the union meeting. However, the next day he reported his attendance to his own supervisor, Doug England. The latter replied that it was not a good idea because of the "position" that Holmes was in.

Springer testified that Holmes told him in the plant that he was being watched. Mosby stated that Holmes walked past his machine and asked whether he was going to "the big meeting." A union meeting was scheduled for that or the following Sunday. This testimony is uncontradicted.

C. Plant Manager Day's Speeches

Dan Day was appointed plant manager in late 1997, and made a speech about unions to employees in October 1997. He said that the Union could not promise them anything, and could not force the Company to agree to anything. All the Union

could do is cause the employees to strike. If this was an economic strike, the Company could hire permanent replacements for the strikers, and the latter could not return to their jobs as long as the replacements wanted them. A union would hamper the Company's ability "to protect all our jobs" by reducing the Company's efforts to meet competition. Day told employees that he did not want a union in the plant, and "would fight it in every legal way possible."⁹

There is evidence that Day made another speech to employees in December 1997. Former employee Douglas Springer testified that he did so, and said that he would not tolerate a union, and would do what he could to keep one out. Machine line leader Terry Leber testified that Day said that the employees would be better off without a union, and that he would do everything in his power to keep one out. Philip Mosby corroborated this testimony. Gary Ferguson testified that Day made a speech in early December in which he said that he knew there was a movement for a union in the shop, and that there were a few people involved in it. Day told the employees that he would not tolerate a union in the Company, and would do everything he could to keep it out. Day testified that he could not recall making a speech in December.

The overwhelming weight of this evidence demonstrates that Day told the employees he would not tolerate a union, and would do everything he could to keep it out. He also acknowledged that he knew that there were "a few people" involved in the Union movement.

D. The Warning to and Discharge of Gary Ferguson

1. The productivity issue

In early 1997, Respondent had two plants operating, the facility in Glasgow, Kentucky, and the plant known as "POKY 3." Ferguson had been transferred to POKY 3 in 1995. In June 1997, the manufacturing function of POKY 3 was "cut down drastically" due to "production" and employees were transferred back to the main plant.¹⁰ At the same time, the 12-hour 4-day shift change was made in the manufacturing operation. As indicated, this was discontinued in January 1998, and the Company returned to the 3shift 8hour schedule. Ferguson returned to the regular plant as a brake-press operator. Production at POKY 3 was resumed.

As indicated, Dan Day arrived as CEO in October 1997. He contended at the hearing that the plant was behind in deliveries of orders, was working excessive amounts of overtime, and had subcontracted one and one-half billion dollars of orders to another producer. Day concluded that there was a delay in production at the brake press machines, and directed Supervisor Tommy Staples to investigate.

Staples testified that the Company produced items pursuant to a specific order, but did not make products "for inventory." He affirmed that the Company was "falling behind in orders" in February 1998. On the other hand, Staples also averred that the Company was not behind in "deliveries," and had not received any complaints from customers that their orders were not being delivered. Staples further testified that Respondent was con-

⁸ GC Exh. 4.

⁹ R. Exh. 11.

¹⁰ Testimony of machine line leader Terry Leber and Gary Ferguson.

cerned with production in all departments, such as the Pega operators, the shearer, the buffers, and the rest of the machine line department. Staples conceded that there had been mistakes by the Pega operators and the shearer, who preceded the brake press operators, and that these mistakes impeded the entire operation. However, Staples was asked whether he was concerned “only” with the brake press operators, and answered, “Yes.”

Gary Ferguson gave a somewhat different version of the Company’s production procedure. It wanted a “smooth flow of work through the plant.” In order to effect this, the Company wanted no delays in one operation because of a lack of orders. Accordingly, it planned for work waiting to be done by each component in the machine line department. Otherwise, the employees would be “standing around waiting,” according to Ferguson. He testified that there were “bottlenecks” or “build-ups” throughout the plant, and that there were no more in the brake press area than in other operations.

2. The investigation of the brake press department

To begin, Supervisor Tommy Staples admitted that the Company had no “production rate” or “production quota” for the machine line department. It did not keep records of the products produced by individual employees. Instead, it determined whether a particular order was completed within the “shop hours” allowed it by a computer. The reason for the lack of productivity quotas, advanced by Respondent, was that the components being manufactured were different from one another.

In lieu of comparing production rates of the employees, Respondent employed a system called “work sampling.” According to Respondent’s witnesses, this involves simply observing randomly an employee over many instances, then computing the percentage of times when he was “working”, and recording the results. A percentage of 80 percent was deemed satisfactory.

There was no Company rule against employees talking to one another, going for a coke, or to the restroom. As indicated, the brake press operators on occasion were working together, or needed advice on a procedure. In December 1997 Ferguson was on his way to his brake press, but stopped to talk to the operator next to him, Jimmy Bulle. Nearby, employees Alan Payne, David Thomerson, and Doug Lloyd were talking. Thomerson was antiunion, and Lloyd was “very strongly against it.” Production Manager England approached Ferguson and Bulle, and asked whether there was a “problem.” Upon receiving a negative reply, England told them to stop talking, and get back to work. Ferguson replied that England had just passed Payne, Thomerson, and Lloyd talking, and had said nothing to them. England replied that the fact they were talking did not give Ferguson and Bulle the right to do so. He then left, passing Payne, Thomerson, and Lloyd on the way. England said nothing to these employees, who were still talking. Ferguson’s testimony is uncontradicted.

Tommy Staples was directed by CEO Dan Day to make work sampling observations beginning in February 1998. He did so only in the brake press department. As examples of “not working,” Staples would record that the employee was talking

with another employee, was absent from his machine, was drinking a soda, etc. Staples recorded that Ferguson was “not working” when Staples observed him talking with line leader Terry Leber or with machine line support personnel. CEO Day conceded that the only way to determine whether two employees were talking about work was to ask them. However, Staples never made any such inquiries. The great majority of Staples’ “not working” observations concerned “talking.”¹¹

Respondent gave Ferguson a counseling on January 15,¹² and another on March 27. On April 2, events took place which formed the basis of final written warnings to both Ferguson and Mosby. One of the brake press machines was “down” that day, and the employee who operated it was elsewhere. Staples transferred the remaining three brake press operators to different machines, i.e., to the machine of another employee. Thus, Ferguson was transferred to Mosby’s machine, and Mosby to Thomerson’s. The employees protested to Staples that the machines were different, and that this would slow down production. Staples admitted at the hearing that the effect of the transfer of the machines was to slow down production.

On the next day, April 3, Ferguson and Mosby were given “final written warnings” for, in effect, inadequate production on April 2. Ferguson’s warning reads in part:

Operator not showing effort to run product through the process at scheduled expectation. Observed by a member of upper management intentionally stopping the process when the dept.’s supervisor leaves the area. Not producing parts in the sequence needed for the next operation. All activity resulting in less than 50% of production performed . . . Poor performance resulted in next operation to run short on their production plan and created more work on press brake operators on other shifts.¹³

Ferguson testified that he did not know what the Company was talking about in asserting that he intentionally stopped production, and stated that he was never told. Ferguson denied that there was any set sequence after he had finished working on a product. Staples engaged in 19 observations of Ferguson on April 2. Fifteen of them showed that he was “working,” while four showed that he was not working.¹⁴ He was thus working 79 percent of the time according to Staples—only one percent less than the Respondent’s asserted goal of 80 percent.

¹¹ The percentage of times when Ferguson was “working” from February through May were: during 4 weeks in February, 86 percent, 88 percent, 85 percent, and 88 percent; in March 67 percent, 87 percent, 88 percent, 73 percent; 79 percent, 94 percent, 88 percent, 93 percent, 72 percent, 82 percent, 81 percent, 59 percent, 68 percent, 80 percent, 82 percent, 76 percent, 63 percent, 72 percent, 63 percent, 72 percent, 75 percent; in April, 73 percent, 79 percent, 91 percent, 85 percent, 90 percent, 87 percent, 92 percent, 83 percent, 63 percent, 76 percent, 33 percent, 76 percent, 81 percent, 65 percent, 80 percent, 70 percent, 70 percent, 70 percent, 75 percent, 64 percent, 62 percent; In May 56 percent, 62 percent, 71 percent, 76 percent, 75 percent. GC Exhs. 6, 14, 15, 16. R. Br., appendix.

¹² GC Exh. 12.

¹³ GC Exh. 11.

¹⁴ GC Exh. 15, p. 2, the figures under the initials “GF” are Ferguson’s.

Finally, Respondent discharged Ferguson on May 8, 1998.¹⁵ CEO Dan Day testified that, although Ferguson had improved his performance on occasion, it was not sufficient, and Day made the decision to discharge him.

Respondent called several employees to testify about Ferguson's work habits. Thus, Mark Johnson testified that Ferguson was the slowest brake press operator; he told Johnson that the only reason he was at the Company was the insurance. However, Johnson further testified that he had not worked in the machine line department since January 5, 1998, and thus had no knowledge of Ferguson's work habits after that date. Employee Doug Lloyd testified that Ferguson did not put a lot of effort into his work. Lloyd opposed the Union, and knew that Ferguson supported it. Employee Todd Medford testified that CEO Day instructed him to observe the work functions of the employees, that he did so and that Ferguson was not working 8 out of 10 times.

Machine line leader Terry Leber, with whom Ferguson worked, characterized Mosby and Ferguson as the "least efficient" of the 4 brake press operators. However, he testified that Ferguson had to wait while Leber was making his decision on a part to be reworked. As indicated, Ferguson received most of these assignments. Leber denied that he had ever seen Ferguson idly standing around while he should have been working, or that he engaged in "loafing."

Ferguson filed a claim for unemployment insurance benefits. After an initial denial, he filed an appeal, and a hearing was held before a senior appeals referee. The claimant and the employer presented witnesses. The denial was set aside, and the referee commented that "there was no evidence that claimant was not having to wait on equipment or decision from a supervisor or team leader."¹⁶

E. The Final Warning Issued to Philip Mosby

Philip Mosby signed a union card in October, and recruited other employees to join the Union.

On April 2, as indicated, a machine was down, and Staples transferred the three remaining brake press operators to different machines. As noted, the employees told Staples that it was not a good idea, since the machines were different, and it would hurt production. According to Mosby, Staples replied that Mosby needed more training on the machine to which he was transferred. On cross-examination, Staples admitted that the likely effect of the transfer was to slow down an employee, and cause him to ask questions of the operator who previously operated it. Nonetheless, Mosby was given Thomerson's machine, and had to ask him how to operate it.

As indicated, on April 3, Respondent delivered a final written warning of deficient production on April 2 to Mosby. The language of the warning is identical to that of the final warning given to Ferguson.¹⁷

¹⁵ The discharge notice states that Ferguson was discharged because of an excessive amount of time not working. The employee demonstrated for brief periods acceptable levels of work. The employee's performance continues to decline and remains at unacceptable levels. GC Exh. 12.

¹⁶ GC Exh. 13.

¹⁷ GC Exhs. 4, 11.

Mosby said he was "shocked" at the warning; Tommy Staples told him that he was not being productive. Mosby asked whether he was talking too much, and Staples replied, "Not excessively." Mosby asked whether he was away from his machine too much, and Staples gave the same reply. Mosby then asked what Staples meant about Mosby's "not being productive," and Staples simply replied that he was "not productive."

Mosby had another meeting, this time with CEO Dan Day, Tommy Staples, and Human Resources Manager Sharon Jones. Day simply said that Mosby was not working up to "production standards."

Respondent had no production standards—it used the "work sampling" procedure. On April 2, the date referred to in the warning, Staples recorded Mosby as working 95 percent of the time.¹⁸ Mosby denied the allegation that he was not producing parts in the sequence required for the next operation.¹⁹ After his work, a part may go to painting, assembly, or welding. Mosby denied that he ever attempted to restrict production.²⁰

F. Factual and Legal Conclusions

1. The alleged unlawful interrogations

(a) Applicable principles

In an early statement of the principles to be applied, the Board stated:

In our view, the test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act. The fact that employees gave false answers when questioned, although relevant, is not controlling. The Respondent communicated its purpose in questioning the employees—a purpose which was legitimate in nature—to the employees and assured them that no reprisal would take place. Moreover, the questioning occurred in a background free of employer hostility to union organization. These circumstances convince us that the Respondent's interrogation did not reasonably lead the employees to believe that economic reprisal might be visited upon them by Respondent. *Blue Flash Express, Inc.*, 109 NLRB (1954).

The Board distinguished its Decision in *Blue Flash* from a contrary holding, in which the interrogation took place a week before the Board election, and the employer failed to give the employees any legitimate reason for the interrogation or assurances against reprisal (id.).

The Board reiterated this standard in *Rossmore House*, 269 NLRB 1176 (1984), where it rejected a per se approach to interrogation of open union adherents and concluded that the test was whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce, employees in the exercise of rights guaranteed by the Act (ibid., 269 at 1177). The Board stated some of the factors to be considered:

¹⁸ GC Exh. 15, p. 2. Mosby's percentage is recorded in the column designated "PM."

¹⁹ Supra, fn. 13.

²⁰ Ibid.

Some factors which may be considered in analyzing alleged interrogations are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation. See *Bourne v NLRB*, 332 F.2d 47 (2d Cir. 1964). These and other relevant factors are not to be mechanically applied in each case. Rather, they represent some areas of inquiry that may be considered in applying the *Blue Flash* test of whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act (*id.*, 269 NLRB 1178, fn. 20).

The Board has concluded that interrogation of a known union adherent's union sympathies was coercive. *Baptist Medical System*, 288 NLRB 882 (1988). In *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), the Board applied the same test to interrogation of employees who were not open union adherents. The Court of Appeals for the Fifth Circuit recently affirmed a Board finding of coercive interrogation because of the employer's promulgation of an illegal rule, and a history of attempting to engage in the same practice in the past. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990). (1990), enforcing in part 294 NLRB 462 (1989).

(b) *The interrogations*

The complaint alleges that Supervisors Mike Ward and Todd Holmes asked employees about a union meeting.²¹ The evidence establishes that in April or May 1998, Supervisor Mike Ward asked employee Douglas Springer about a union meeting to be held on Sunday afternoon and that Todd Holmes asked Philip Mosby a similar question in late March.

Ward had engaged in similar interrogation in the past. Thus, during the first union campaign, he told Ferguson that he understood there was a union meeting that night, and asked how they were going. In October 1997, Ward again asked Ferguson how his meetings were going. When Ferguson answered that his father's meetings were going well, Ward stated that he was talking about union meetings. Human Resource Manager Sharon Jones interrogated Ferguson about the Union movement. When Ferguson protested to Company managers about being denied compensation for work jeans, Terry Jessie, in their presence, asked Ferguson why he was so strongly for the Union. The managers looked at Ferguson for an answer.

Mosby testified that Todd Holmes walked past his machine and asked whether he was going to "the big meeting," when a union meeting had been planned. I conclude that Holmes' inquiry referred to the union meeting. As I further conclude *infra*, Holmes engaged in surveillance and created an impression of surveillance.

CEO Day's statements to employees—that he would not tolerate a union and would do what he could to keep one out—establish the Company's opposition to the union movement. Ward did not communicate his purpose in asking Springer questions, nor did he give any assurances against reprisals. Holmes actually participated in the discipline administered to Mosby.

As for Holmes' status, he testified that he was a supervisor, Springer testified to the same effect, Holmes signed Mosby's reprimand as a supervisor, and the employees at the union meeting told the business against that Holmes was a supervisor. The alleged fact that Holmes was hourly paid (as were other supervisors) but was salaried at a later date does not mitigate against a finding that, in these circumstances, he had apparent if not actual authority as a supervisor, and I so find. This conclusion is buttressed by England's statement to Holmes that he should not have gone to the union meeting considering his "position."

I conclude that the interrogations of Ward and Holmes were coercive, and violated Section 8(a)(1).

2. The alleged surveillance and impression of surveillance

The complaint alleges that Respondent, by Todd Holmes, engaged in surveillance of employees' union activities by attending a union meeting, and created an impression that employees' union activities were under surveillance by telling them that Respondent was watching them.

The evidence shows that Holmes attended a union meeting on January 9, 1998. He denied that anybody from management asked him to do this. Nonetheless, he reported this visit to supervisor Doug England the next day. Although England assertedly told him that he should not have done so considering his "position," Holmes told Springer that he was being "watched."

Respondent argues that it is not responsible for Holmes' conduct because it did not send him to the union meeting, and did not ask him to say anything to employees about the Union.²²

This argument has no merit. I have concluded that Holmes was a supervisor. At the very least, he had apparent supervisory authority. An employer need not have given express authority to an individual in order to be held responsible for the individual's conduct. Under the doctrine of apparent authority, the acts of another will be attributed to the employer if a third person could reasonably believe that the employer had consented to have a particular act done on its behalf. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Dentech Corp.*, 294 NLRB 924, 925 (1989); *Restatement (Second) of Agency*, Sec. 27 (1958). Thus, apparent authority exists when the employer either intends "to cause the third person to believe that the agent is authorized to act for him, or, . . . should realize that his conduct is likely to create such belief." *Restatement (Second) of Agency*, Sec. 27 Comment (1958). Even if the conduct of another was contrary to an employer's express instruction, the employer will be held responsible for that conduct if employees could reasonably believe that the act was authorized. *NLRB v. Crown Laundry & Dry Cleaners*, 437 F.2d 290, 293 (5th Cir. 1971).

Holmes was nearby when Springer was talking with Shane White at the union meeting. Springer and White felt that they were being watched. I conclude that the visit to the union meeting constituted unlawful surveillance of the union activi-

²¹ GC Exh. 1(e), par. 8.

²² R. Br. 22.

ties of Respondent's employees. *Intertype Co. v. NLRB*, 371 F.2d 787 (4th Cir. 1967), *enfg.* 157 NLRB 1419 (1966).

Despite England's admonition to Holmes that he should not have attended the union meeting, Holmes told Springer in the plant that he was being watched. In light of Holmes' unlawful inquiry about the union meeting and his unlawful attendance at the meeting, it is obvious that this statement to Springer conveyed an impression that Springer's union activities were under surveillance. I conclude that, in so doing, Respondent violated Section 8(a)(1).

3. The final warning to and discharge of Gary Ferguson

The alleged unlawful warning to and discharge of John Ferguson involved asserted violations of Section 8(a)(3) of the Act. The General Counsel has the burden of establishing a *prima facie* case that is sufficient to support an inference that protected conduct was a motivating factor in an employer's decision to discipline an employee. Once this is established, the burden shifts to the Respondent to demonstrate that the discipline would have been administered even in the absence of the protected conduct. The General Counsel must supply persuasive evidence that the employer acted because of antiunion animus.²³

Ferguson was for several years the leader of the Union movement, with supervisory knowledge of his activities. He initiated the 1995 campaign, and Supervisor Ward asked him about the meetings. Ferguson also started the 1997 campaign signed a union card, and distributed handbills. Supervisor Ward again asked him in 1997 about how his meetings were going. When Ferguson interpreted this as a reference to his father's meetings, Ward corrected him and explicitly referred to union meetings. Respondent argues that Ward's remarks at this time—that a union keeps management on its toes and that Ward himself would sign a card if he were not a supervisor—show that Ward (and Respondent) lacked union animus.²⁴

This argument is disingenuous considering CEO Day's statement to employees that he would not tolerate a union in the plant, and would do everything he could to keep one out, as well as Respondent's unlawful interrogation, surveillance, and impression of surveillance. The Company's hostility to the Union movement is further evidenced by Production Manager England's selective application of a *de facto* "no talking" rule against Ferguson and Jimmy Bulle, while allowing antiunion employees to continue talking without objection. When Ferguson protested the refusal of Terry Jessie to give him reimbursement forms for work jeans, the Company's managers allowed the protest meeting to be transformed into interrogation about the Union movement.

I conclude that the General Counsel has established a *prima facie* case sufficient to support an inference that Ferguson's protected activity was a motivating factor in Respondent's decision to discipline him.

Respondent's asserted reason for the discipline is not persuasive. Although Ferguson received a reprimand in 1992 to im-

prove his work quality and quantity, he was made a team leader in 1994 with an increase in pay. Although he was transferred to "POKY 3" in 1995 as a brake press operator and reduction in pay, he was again promoted to line leader in 1996 with restoration of the higher pay.

When CEO Day arrived in late 1997, he instituted an "investigation." What was the reason for this activity? According to Day, the plant was behind in delivery of orders, was working excessive overtime, and one and one-half billion dollars in orders had been subcontracted to another employer. To correct this grave condition, Day directed Supervisor Tommy Staples to investigate only one of the Company's many operations—the brake press operators.

Staples agreed that the Company was "falling behind in orders" in February 1997. However this was obviously a problem for the sales department. Staples denied that the Company was falling behind in "deliveries," and thus exonerated the manufacturing components of responsibility for the Company's asserted problem. Staples' contradiction of Day's assertions is emphasized by the fact that Respondent reduced its operative capacity in mid-1997 by cutting down functions at POKY 3. However, a few months later according to Day, the Company was bursting at the seams with orders, and had to subcontract one and one-half billion dollars in orders to another company. In light of Staples' testimony contradicting Day and the unlikely nature of Day's description of the asserted crisis, I conclude that the reason for the "investigation" was not the one claimed by Day.

Although Day contended that there was a delay in production at the brake press machines, Supervisor Staples admitted that there were mistakes at the preceding functions of the shearer and the Pega operators. Nonetheless, Staples, following Day's orders, investigated only the brake press operators. Ferguson gave a more realistic description of the production procedure. Agreeing with Staples, he testified that there were "buildups" throughout the various operating functions, because the Company wanted a "smooth flow" from one function to the next. The combination of Staples' admissions and Ferguson's testimony makes Day's assertion of a "buildup" only at the brake press department unbelievable.

Most of Staples' recordings of "not working" were based on assertions that the employee was "talking." He never inquired about the nature of the conversation, despite CEO Day's admission that the only way to determine whether two employees were talking about work problems was to ask them. Yet Staples did not do so. In fact, he recorded Ferguson as "not working" when the latter was talking with machine line leader Terry Leber, from whom Ferguson had to receive instructions about reworks and reruns, jobs which were assigned to him in numbers greater than those assigned to other employees. Staples in fact failed to conduct a fair and complete investigation, and thus manifested Respondent's discriminatory motivation under accepted Board precedent.

The testimony of Respondent's employee witnesses was not persuasive. Although Mark Johnson testified that Ferguson was the slowest brake press operator, Johnson was not in the brake press department during the period under investigation. Doug Lloyd opposed the Union and was, based on that fact and his demeanor, a biased witness. Todd Medord's comments

²³ *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (19th Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Manno Electric*, 321 NLRB 278, *fn.* 12 (1996).

²⁴ R. Br. 22.

were too sparse to form the basis for any judgment. The most persuasive evidence was that given by Terry Leber, who gave Ferguson work assignments. Although he characterized Ferguson (and Mosby) as the "least efficient" of the brake press operators, he denied that Ferguson ever stood around when he should have been working, or engaged in loafing. Leber was not consulted when the decision to discipline Ferguson was made.

In summary, I conclude that Respondent's response for disciplining Ferguson was pretextual because (1) the asserted reason for the "investigation" is unbelievable in light of the contradictions in Respondent's evidence; (2) the "investigation" was selectively directed only at the brake press operators where Ferguson and Mosby were located despite similar problems with other manufacturing components, and was unfairly conducted; (3) Ferguson was working 79 percent of the time on April 2 despite Staples slowing operations down by switching employees from one machine to another; and (4) Ferguson was reprimanded only once prior to the first union campaign in 1995, but was thereafter twice promoted to "line leader" with a raise in pay each time.

I conclude that Respondent has not rebutted the General Counsel's prima facie case, and that Respondent gave Ferguson a final warning on April 3, 1998, and discharged him May 8, 1998, because of his protected activity, in violation of Section 8(a)(3) and (1). Although not determinative, it may be noted that the favorable award Ferguson received in his unemployment compensation case is consistent with this decision.

4. The final written warning to Philip Mosby

Although Mosby was not as active in the union movement as Ferguson, he did sign a union card and recruited other employees. Supervisor Holmes' unlawful inquiry to Mosby about whether he was going to a scheduled union meeting suggests the Company's awareness of Mosby's union affiliation. Indeed, CEO Day stated in one of his speeches that there were a few people in the plant involved with the Union movement, a statement indicating knowledge of such persons on Day's part.

Mosby's final warning on April 3, is a paraphrase of the final warning given to Ferguson on the same day. Mosby denied all of the charges. Staples told Mosby that he was "not being productive." When Mosby attempted to get an explanation of this allegation—such as "talking," "being away from his machine," etc.—he received the same answer, he was "not productive." As Respondent was careful to point out, it had no production standards, and utilized its "work sampling" techniques in lieu of comparative production figures. The irony of this approach is that on April 2, when Mosby was allegedly committing numerous offenses, and Staples was slowing down operations by switching machines, Mosby was working 95 percent of the time. The warning is a manufactured invention devoid of any meaning. I conclude that Respondent gave Mosby a final written warning on April 3, 1998, because of his protected activity, in violation of Section 8(a)(3) and (1).

In accordance with my findings above, I make the following.

CONCLUSIONS OF LAW

1. Pan-Oston Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Sheet Metal Workers' International Association, Local No. 433, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees about their union activities, by engaging in surveillance of such activities, and by creating an impression of such surveillance.

4. Respondent violated Section 8(a)(3) and (1) of the Act by giving employee Gary Ferguson a final written warning on April 3, 1998, and by discharging him on May 8, 1998, because of his protected activity; and by giving employee Philip Mosby a final written warning on April 3, 1998, because of his protected activity.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices it is recommended that it be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully gave Gary Ferguson a final written warning on April 3, 1998, and unlawfully discharged him on May 8, 1998, I shall recommend that Respondent be required to offer him immediate reinstatement to his former position, dismissing if necessary any employee hired to fill his position, or, if such position does not exist, to a substantially equivalent position, and to make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct, by paying him a sum of money equal to the amount he would have earned from the time of his discharge to the date of an offer of reinstatement, less net earnings during such period, to be computed in the manner established by the Board in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²⁵ I shall also recommend that Respondent be required to expunge from its records all references to its unlawful final written warning given to Ferguson on April 3, 1998, and its discharge of him on May 8, 1998, and inform him in writing that this has been done, and that these actions will not form the basis of any future discipline of him.

It having been found that Respondent also gave employee Phillip Mosby an unlawful final written warning on April 3, 1998, I shall recommend that it be required to remedy this offense in the same manner as that stated above with reference to the unlawful discharge of and final written warning to Gary Ferguson.

I shall also recommend that posting of appropriate notices.

²⁵ Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. §6621. Interest accrued before January 1, 1987 (the effective date of the amendment), shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

Upon these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁶

ORDER

Pan-Oston Company, Glasgow, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees about their union and other protected activities, engaging in surveillance of its employees' protected activity, or creating an impression of surveillance of such activity.

(b) Discouraging membership in Sheet Metal Workers' International Association, Local No. 433, AFL-CIO, or any other labor organization, by giving warnings to or by discharging employees because of their union or other protected activities, or by discriminating against them in any other manner with respect to their wages, hours, tenure of employment or any other terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 8(a)(1) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gary Ferguson reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, dismissing if necessary any employee hired to fill said position, and make him whole in the manner set forth in the remedy section of this Decision.

(b) Within 14 days from the date of this Order, expunge from its records all references to its discharge of Gary Ferguson, and to its final written warnings given to Ferguson and Philip Mosby on April 3, 1998, and inform each of them in writing that this has been done, and that the aforesaid actions will not be used as the basis of any future discipline of either of them.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(d) Within 14 days after service by the Region, post at its Glasgow, Kentucky facility, copies of the attached notice marked "Appendix."²⁷ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 9, 1998.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 29, 1999

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees about their union and other protected activity.

WE WILL NOT engage in surveillance of our employees' union or other protected activity, and WE WILL NOT discourage membership in the Sheet Metal Workers' International Association, Local No. 433, AFL-CIO, or any other labor organization, by giving warnings to or by discharging employees because of their Union or other protected activity, or by discriminating against them in any other manner.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 8(a)(1) of the Act.

WE WILL offer Gary Ferguson reinstatement to his former position, and make him whole with interest for any loss of earnings he may have suffered because of our unlawful discharge him.

WE WILL expunge from our records all references to our discharge of Gary Ferguson and our unlawful final written warnings given to Gary Ferguson and Phillip Mosby, and inform them in writing that this has been done and these actions will not form the basis of any future discipline of them.

PAN-OSTON COMPANY

²⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."